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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MARITRANS OPERATING PARTNERS, L.P., *et al.*
Petitioners,

v.

M/V BALSA 37, *et al.*
Respondents.

Petition for Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

I. Whether a maritime creditor's traditional right to seek maritime attachment of a debtor's property, pursuant to Supplemental Admiralty Rule B of the Federal Rules of Civil Procedure, should be defeated by a local rule, adopted by several of the United States District Courts, which invalidates such an attachment if a substitute, state statutory agent for service of process is present within the local district?

LIST OF PARTIES

The parties to the proceeding below were the petitioners, Maritrans Operating Partners, Limited Partnership, Bouchard Transportation Co., Inc., Tug Capt. Fred S. Bouchard Corp. and Barge B. No. 155 Corp. and the respondents, M/V BALSA 37, her engines, tackle, furnishings, etc. in rem, Tsacaba Shipping Co., Inc. and Dowa Line America Co., Ltd., who were appellants in the court below.

Pursuant to Rule 29.6 of the Rules of the United States Supreme Court, the Court is advised that the following petitioners do not have any parent companies or any subsidiaries that are not wholly-owned:

> Bouchard Transportation Co., Inc., Tug Capt. Fred S. Bouchard Corp., and Barge B. No. 155 Corp. are privately owned corporations.

The following are parent or subsidiary companies (not wholly owned) of the remaining petitioners:

Maritrans Operating Partners, L.P.:

Parent Companies:	Maritrans, Inc. Maritrans General Partner, Inc.

Subsidiary Companies: All wholly owned.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, dated September 5, 1995, is reported as *Maritrans Operating Partners, et al. v. The M/V BALSA 37, et al.*, 64 F.3d 150 (4th Cir. 1995), and is reproduced at page 1a of the Appendix to this Petition ("Pet. App."). The opinion of the United States District Court for the Eastern District of Virginia dated August 31, 1993, is unreported and is reproduced at Pet. App. 13a. The Order and Opinion of the United States District Court for the Eastern District of Virginia dated August 25, 1993, is unreported and is reproduced at Pet. App. 21a.

The Order of the United States Court of Appeals for the Fourth Circuit denying rehearing and denying rehearing *in banc*, dated October 3, 1995 is not published and is reproduced at Pet. App. 41a. The Order of the United States District Court for the Eastern District of Virginia which directed the release of M/V BALSA 39 from custody of the United States Marshal, dated August 27, 1993, is not published and is reproduced at Pet. App. 35a. The Order of the United States Court of Appeals for the Fourth Circuit, denying respondents' motion to stay the trial court's order of attachment, dated August 27, 1993, is not published and is reproduced at Pet. App. 33a. The Order of the United States District Court for the Eastern District of Virginia, certifying the question on appeal, dated August 31, 1993, is unpublished and reproduced at Pet. App. 38a.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1995. Pet. App. 1a. The court of appeals denied a timely Petition for Rehearing on October 3, 1995. Pet. App. 41a. The jurisdiction of the district court was based upon the maritime and admiralty jurisdiction established in 28 U.S.C. § 1333 and Rule 9(h) of the Federal Rules of Civil Procedure. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Article III, section 2, clause 1 of the Constitution of the United States provides: "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction."

Supplemental Admiralty Rule B to the Federal Rules of Civil Procedure is set forth verbatim at Pet. App. 45a.

Rule 4(h) of the Federal Rules of Civil Procedure is set forth verbatim at Pet. App. 44a.

Rule 83 of the Federal Rules of Civil Procedure is set forth verbatim at Pet. App. 51a.

Local Admiralty Rule (b)(1) of the Rules of the United States District Court for the Eastern District of Virginia is set forth verbatim at Pet. App. 48a.

Virginia Code Section 13.1-758F is set forth verbatim at Pet. App. 49a.

Virginia Code Section 13.1-757 is set forth verbatim at Pet. App. 50a.

Rule 4(d) of the Federal Rules of Civil Procedure (1993 Version) is set forth verbatim at Pet App. 53a.

STATEMENT OF THE CASE

On August 10, 1993, a collision occurred in Tampa Bay, Florida, involving the M/V BALSA 37, a cargo ship owned by the defendant, Tsacaba Shipping Co., Inc. ("Tsacaba"). At the time of the collision the vessel was being operated by the defendant Dowa Line America Co., Ltd. ("Dowa"). At approximately 5:00 a.m. an unexpected maneuver by the M/V BALSA 37 resulted in a collision between M/V BALSA 37, the Tug FRED S. BOUCHARD and Barge B-155, both owned by Plaintiff Bouchard Transportation Co., Inc. ("Bouchard") and the barge OCEAN 255 and the Tug SEAFARER, both owned by Maritrans Operating Partners, L.P. ("Maritrans").

As a result of the collisions, a substantial amount of No. 6 oil was spilled from the Barge B-155 requiring a massive and costly clean-up effort. The Barge OCEAN 255 was laden with jet fuel which exploded after the collision and burned for fifteen (15) hours. Bouchard and Maritrans expended over $55,000,000 in cleanup costs due to the collision. The M/V BALSA 37's owners did not participate in the spill clean-up. The plaintiffs currently face substantial claims, in excess of $19,000,000, from the United States and the State of Florida for damages to natural resources caused by the oil spill. In addition, various third party claimants have been paid in excess of $2.2 million by the plaintiffs and claims totalling over $3.2 million remain pending. Court actions were filed by both plaintiffs against Tsacaba and

Dowa in the United States District Court for the Middle District of Florida, Tampa Division, to recover the various damages related to this disaster.

Tsacaba is a foreign corporation. After determining that Tsacaba was not registered with the Virginia State Corporation Commission to do business in Virginia, and that Tsacaba had not appointed a registered agent for the acceptance of service of process, and had no offices in Virginia, Bouchard and Maritrans filed Verified Complaints under Supplemental Admiralty Rule B(1) in the United States District Court for the Eastern District of Virginia, Norfolk Division, pursuant to the maritime and admiralty jurisdiction established in 28 U.S.C. § 1333 and Rule 9(h) of the Federal Rules of Civil Procedure.

The Verified Complaints contained prayers for process to attach defendants' property found within the district and, specifically, the vessel M/V BALSA 39 which is owned by defendant Tsacaba. Accordingly, for purposes of the subject attachment, Tsacaba is the only relevant defendant as only its assets have been attached.

Plaintiffs' counsel appeared before District Judge Henry C. Morgan, Jr., on August 19, 1993 for pre-attachment review of the Complaints pursuant to Rule B and he issued two (2) Orders Directing Clerk to Issue Process of Attachment. The attachments were served on the M/V BALSA 39 by the U.S. Marshal at approximately 6:00 a.m. on August 20, 1993.

Tsacaba moved to quash the attachment on the grounds that, although Tsacaba had no discernable connection with the district, Tsacaba was actually doing business in Virginia and that service could be made on the Clerk, State Corporation Commission pursuant to state law. Judge

Morgan rejected this argument and ruled that to allow a defendant to quash a Rule B attachment by arguing, after the fact, that it was subject to substituted service of process by virtue of prior, but undetectable, contacts with the district, would be inconsistent with both the language and purpose of Rule B. (Pet. App. 21a)

Circuit Judge Emory Widener heard the interlocutory appeal in Abingdon, Virginia on August 27, 1993, and ruled that the Order denying the motion to vacate the attachment was interlocutory and therefore not appealable. (Pet. App. 33a) On the same date defendant posted two bonds, each in the amount of $1.8 million, in favor of each of the plaintiffs in order to secure the release of M/V BALSA 39. (Pet. App. 35a)

Defendant's counsel returned to District Judge Morgan for relief and on August 31, 1993 a question for appeal was certified. (Pet. App. 38a) Briefs were filed and oral argument was heard by United States Court of Appeals for the Fourth Circuit on April 13, 1994 and a decision was published seventeen months later on September 5, 1995. (Pet. App. 1a) The Opinion reversed the holding of the trial judge and quashed the attachment on the basis that the defendant could be found within the district because substituted service was available upon the Clerk of the State Corporation Commission.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Fourth Circuit, in the opinion below, overturned the district court's interpretation of its own local admiralty rule and interpreted the rule in a manner which severely restricts the use of maritime attachment as a means of establishing jurisdiction

and obtaining security in the Eastern District of Virginia. This interpretation has wide-spread impact not only because the local admiralty rule has been adopted in similar form in several other jurisdictions, but also because it conflicts with the standard "two-pronged" test for determining whether a defendant is susceptible to maritime attachment which has been adopted by several other circuits. Consequently, it is appropriate that this Court review the current application of Supplemental Admiralty Rule B ("Rule B") maritime attachment and set the bounds of maritime attachment.

I. WHETHER LOCAL ADMIRALTY RULES WHICH DEFINE THE TERM "NOT FOUND WITHIN THE DISTRICT" SUBSTANTIVELY AND IMPROPERLY ALTER CREDITORS' RIGHTS TO PURSUE RULE B MARITIME ATTACHMENT?

A. History of maritime attachment in federal maritime jurisprudence.

Maritime attachment has been part of American federal jurisprudence since this Court approved its use 170 years ago in *Manro v. Almeida*, 23 U.S. (10 Wheat.) 473 (1825). As early as 1844, procedures for maritime attachment were codified in Rule 2 of the first Supreme Court Admiralty Rules.[1] Under current procedural statutes, if a defendant is not subject to *in personam* jurisdiction within the district because the defendant cannot be "found within the district", then defendant's property may be attached. Supplemental Admiralty Rule B.

The necessity for a liberal right of maritime attachment

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[1] These first rules can be found at 44 U.S. (3 How.) iii-xiv (1845).

was expressed by this Court in the *Manro* opinion where the following passage from Clerke's *Praxis* was cited:

> If the defendant has concealed himself, or has absconded from the kingdom, so that he cannot be arrested, if he have any goods, merchandise, ship, or vessel, on the sea, or within the ebb and flow of the sea, and within the jurisdiction of the lord high admiral, a warrant is to be impetrated to this effect, namely, to attach such goods or ship of Defendant . . .

23 U.S. (10 Wheat.) at 491.

The right of attachment in maritime jurisprudence is invaluable because obtaining a default judgment against a foreign shipowner often proves to be a hollow victory if the assets of that debtor never return to the jurisdiction. *Swift & Co. v. Compania Caribe*, 339 U.S. 684, 695 (1949). The right of maritime attachment compels the foreign shipowner to appear to answer the claim, and provides a source of security for payment of the judgment. *In Re Louisville Underwriters*, 134 U.S. 488 (1890). *See also Manro*, 23 U.S. (10 Wheat.) at 489.

Maritime attachment pursuant to Rule B is only available, however, when the foreign debtor is not "found within the district." Supplemental Admiralty Rule B(1). This requirement has been part of the admiralty rules for attachment since Rule 2 was first promulgated in 1844, and has never been defined by rule.[2] At the time the Admiralty

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[2] This Court, in 1873, determined that a company, incorporated in New Jersey, was not "found" within the Eastern District of New York, and therefore was subject to maritime attachment, despite the fact that the company

Rules were merged with the civil rules in 1966, the Advisory Committee to Rule B, chose not to define this requirement in Rule B, and instead left it to be developed on a case-by-case basis. 1966 Advisory Committee Notes to Supplemental Admiralty Rule B.

Given this background, courts have uniformly adopted a "two pronged test" for determining if a defendant could be "found within the district" for the purposes of defeating maritime attachment. The first prong of the test inquires whether the defendant can be found within the district for the purposes of exercising *in personam* jurisdiction, and the second prong inquires whether the defendant can be found for purposes of effectuating service of process. *Seawind Compania, S.A. v. Crescent Line, Inc.*, 320 F.2d 580, 582 (2d Cir. 1963). Only if both questions are answered in the affirmative is maritime attachment defeated. As of this date, this Court has not interpreted the phrase "found within the district" and the two-pronged test has survived for over thirty years.

B. Whether the presence of a state statutory agent for service of process within the district is sufficient by itself to defeat maritime attachment as established by Supplemental Admiralty Rule B?

It is upon this background of maritime attachment that this particular local admiralty rule was adopted and implemented. The rule provides:

> LAR(b)(1) *"Not Found Within The District" Defined.* A defendant is considered to be "not found

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operated a factory and employed officers of the company within the district. *Atkins v. The Disintegrating Company*, 85 U.S. (18 Wall.) 272 (1873).

within the district" if, in an action *in personam*, the defendant cannot be served with the summons and complaint as provided in Federal Rule 4(d).

Local Admiralty Rule (b)(1), and its companion rules in other districts, severely restricts, and in some districts eliminates, a creditor's ability to seek maritime attachment and garnishment pursuant to Rule B. The local rule defeats maritime attachment whenever substitute service is available on a statutory agent located within the district. The local rule thus eliminates a fundamental element of traditional Rule B analysis - that maritime attachment will only be defeated when the defendant is sufficiently "doing business" within the jurisdiction to be subject to *in personam* jurisdiction.

Local Admiralty Rule (b)(1) has been adopted, in nearly identical form, by nine of the thirty-eight jurisdictions which have promulgated local admiralty rules.[3] The plain reading of the local rule establishes that a defendant is not found within the jurisdiction, and is therefore subject to maritime attachment and garnishment, if he cannot be served with the summons and complaint pursuant to Rule 4(h).[4]

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[3] Eastern District of Virginia Local Admiralty Rule (b)(1), Eastern District of North Carolina Local Rule 82.00(d), Middle District of Florida Local Admiralty Rule 7.02(a), Southern District of Florida Local Admiralty Rule (B)(1), Northern District of California Local Rule 603-1, Central District of California Local Admiralty Rule B, Eastern District of California Local Rule 510(d), District of Northern Mariana Islands Local Admiralty Rule B(1), and District of Guam Local Admiralty Rule B(1).

[4] The local rule cites Federal Rule of Civil Procedure 4(d), which has since been amended and the applicable provisions moved to Rule 4(h). Former Rule 4(d) has been

Consequently, in nine of the thirty-eight maritime jurisdictions, the validity of maritime attachment will not be determined based on the traditional "two prong" test involving sufficient minimum contacts with the jurisdiction and the presence of an agent for service of process within the district.

The facts represented in this Petition are common in the arena of maritime attachment. In typical attachment situations, a foreign vessel calls at an American port and fails to pay for services rendered at that port, or the vessel is involved in a maritime tort which causes damage to cargo, another ship or other property. Foreign vessel owners typically have no assets within the United States other than any vessel which may be present from time to time in an American port. Creditors, in order to obtain jurisdiction and security for their claim, attach these vessels as they arrive in United States ports.

In this case, Petitioners alleged that the owner of M/V BALSA 37 committed a maritime tort in Tampa Bay, causing a significant amount of pollution damage for which petitioners sought security by way of maritime attachment. Rule B attachment was undertaken to establish *quasi in rem* jurisdiction over the vessel owner, Tsacaba, as well as to obtain security to ensure partial satisfaction of any judgment.

In most jurisdictions, if a registered agent for service of process is not present in the district, or if the vessel owner has insufficient contacts with the district to establish *in personam* jurisdiction, then maritime attachment pursuant to Rule B is valid. However, in the nine jurisdictions adopting this local rule, it is not necessary for the defendant to have sufficient contacts to establish *in personam* jurisdiction,

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reproduced in the appendix as well as current Rule 4(h).

provided that the state long-arm statutes permit service on a statutory agent located within the district.

This disparity in the application of Rule B has created a substantive, jurisdictional difference in the availability of the traditional maritime attachment remedy within the United States. This disparity, however, is not based upon well-reasoned analysis, but is rather based upon the decisions of the various state legislatures considering jurisdiction only in a civil law context of expansively protecting the remedies of their citizenry against foreign wrongdoers. As a result of the local admiralty rules, such state statutory schemes are being used to destroy the longstanding protections afforded to maritime creditors under Rule B, a purpose completely inconsistent with the state long-arm statutes.

To avoid the increasingly diverse interpretations of "doing business" which are now arising, it is in the best interest of this Court, and the maritime community, to establish a consistent, uniform method for determining whether a defendant is "not found within the district" as required by Rule B.

Judge Morgan, in his ruling, applied Local Admiralty Rule b(1) in a manner which sustained plaintiffs' Rule B attachment despite the alleged presence of a statutory agent upon whom process could be served within the district. Judge Morgan's order is consistent with a fair reading of the law and his holding is in complete harmony with case law and the Supplemental Admiralty Rules. The Fourth Circuit's reversal, however, creates a conflict among the various courts regarding the impact of statutory agents on the validity of maritime attachment actions.

The local admiralty rule specifically provides that a defendant is present within the district if service of process

and summons can be made upon a statutory agent, as set forth in former Rule 4(d) of the Federal Rules of Civil Procedure. In Virginia, state law provides two separate means of making substitute service on a foreign corporation. The traditional state long-arm statute permits service on the Secretary of the Commonwealth in situations where the foreign corporation committed a tort within the state.[5] The facts of this case did not authorize substitute service pursuant to this statute.

The second means of substitute service in Virginia establishes the Clerk of the State Corporation Commission as a statutory agent for service of process for corporations engaging in unauthorized business within the Commonwealth.[6] As this statute is intended to induce foreign corporations to obtain a certificate of authority to transact business in the Commonwealth, the number and type of transactions necessary to establish that a corporation is "doing business" is quite liberal.[7]

Of the 94 federal judicial districts, 56 have not promulgated local admiralty rules.[8] Because Rule B does not, on its face, provide for substitute service on a statutory agent, in those 56 jurisdictions the presence of a statutory agent within the district does not defeat Rule B attachments. Of the thirty-eight remaining jurisdictions, only nine have

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[5] VA CODE ANN. §§ 8.01-328.1 and 8.01-329 (Michie 1995) apply.

[6] VA CODE ANN. § 13.1-758F (Michie 1995).

[7] VA CODE ANN. § 13.1-757 (Michie 1995).

[8] Determined through a survey of FEDERAL LOCAL COURT RULES, vols. 1-5 (2d ed. 1991)

local rules which define "not found within the district" in a manner similar to the local rule of the Eastern District of Virginia. Substitute service on a statutory agent will not defeat Rule B attachments in four of these nine remaining jurisdictions because the statutory agent is located outside the district and therefore is not "found within the district" as required by Rule B.[9]

A conflict has arisen, however, among the remaining five districts which have adopted the local rule. In one jurisdiction, Guam, it was judicially determined that the availability of substitute service on a statutory agent would not defeat Rule B attachment despite the existence of a local rule identical to the rule in the instant case.[10] With regard to the Eastern District of Virginia, and arguably the Eastern District of North Carolina, it has been judicially determined that the local rule does permit service on a statutory agent alone to defeat maritime attachment. There are no published opinions interpreting the local rule in California or Florida. However, the Eleventh Circuit, in dicta, has opined that the anomaly that substitute service was available in one of Florida's districts, but not the other two, was intended by Congress. *LaBanca v. Ostermunchner*, 664 F.2d 65, 68 n.4. (11th Cir. 1981).

It is an important goal of courts when sitting in admiralty to achieve uniformity in the practice and development of rules of law. *The Lottawanna*, 88 U.S. (21 Wall.) 558

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[9] Statutory agents are not found in the following jurisdictions: Middle District of Florida, Southern District of Florida, Eastern District of California and Central District of California.

[10] *Yu Sheng Fishery v. Dongwon Industries*, 1993 A.M.C. 110 (D. Guam 1991).

(1874); *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1916). The interpretation supported by the Fourth Circuit and the Eleventh Circuit denies plaintiffs in these circuits the significant advantages Rule B *quasi in rem* jurisdiction was designed to provide. Judge Morgan's decision, which refuses to allow substituted service upon a statutory agent in Richmond, Virginia under Local Admiralty Rule b(1) to defeat attachment, is in harmony with the Rule B attachment requirements in 89 of the other 93 federal districts.

C. Whether the local admiralty rule is invalid because it is inconsistent with Supplemental Admiralty Rule B(2)?

The local admiralty rule is not only in conflict with the current interpretation of "not found within the district", in other circuits, but also contradicts Rule B itself. Local Admiralty Rule (b)(1) directly conflicts with the provisions of Supplemental Admiralty Rule B(2).

Supplemental Admiralty Rule B(2) provides that when an attachment is made and the vessel owner does not answer, a default judgment may be entered only after the plaintiff has served on the defendant the complaint, summons and process of attachment *in a manner authorized by Rule 4(d).*[11] The local rule, conversely, states that a defendant is "not found within the district" if, in an action *in personam*, the defendant *cannot be served with the summons and complaint as provided in Federal Rule 4(d).* These two provisions cannot

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[11] Once again, Supplemental Admiralty Rule B is citing to Rule 4 before the 1994 amendments. The applicable service provisions are now found in Rule 4(h) of the Federal Rules of Civil Procedure.

be read in a manner which is consistent.[12] If a summons and complaint can be served in accordance with Rule 4(d) (now Rule 4(h)) to comply with the requirements for a default judgment, then Rule B attachment would be defeated *per se*.

Local rules must be purely procedural and may not impact the jurisdiction of the court. *Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co.*, 263 U.S. 629, 635 (1923). In the case of *Smith v. Frank*, 923 F.2d 139 (9th Cir. 1991), the local rules of the United States District Court for the Northern District of California limited the length of objections to a magistrate's recommendations to 25 pages. Plaintiff timely filed objections, but the court refused to accept the objections because the pleading was 59 pages in length. The Ninth Circuit, on appeal, held that the objections were timely filed and that a local rule which denies the right to file the objections has an "impermissible jurisdictional character." *Id.* at 142. *See also Loya v. Desert Sands Unified School District*, 721 F.2d 279 (9th Cir. 1983).

In this case, the local admiralty rule significantly alters the jurisdiction of the court. Without the local rule, substitute service on statutory agents within the district would not impact a maritime creditor's ability to seek attachment. The promulgation of this local rule, however, makes it nearly impossible to obtain maritime attachment in those districts in which the designated state statutory agent is found.

Prior to this ruling, five reported cases discussed the

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[12] Rule 83 of the Federal Rules of Civil Procedure provides that district courts may promulgate local rules provided the rules are not inconsistent with the Federal Rules of Civil Procedure.

efficacy of substitute service.[13] In three of these cases, *Rea B, La Banca* and *Integrated Container Service*, courts sustained the Rule B attachments because the statutory agent was not found within district as required by Rule B and, thus, did not reach the issue presented in this case.

A fourth case, *FEDCOM* did not involve a local admiralty rule but instead considered the defendant's assertion that it was found within the district pursuant to Rule B because substitute service was available through the Secretary of State under Maine's unauthorized business statute. The court held, however, that substitute service was only permitted under the Maine statute when the claim arose out of business transacted in the state. Therefore, the court was not required to confront the issue of whether substitute service would defeat Rule B attachment.

The fifth case, which addressed service by long-arm statute in the Rule B context, involved a single district jurisdiction, Guam, in which the court determined that a Rule B attachment was valid despite the presence of a statutory agent within the jurisdiction. In *Yu Sheng Fishery*, the court reviewed the decisions in *La Banca* and *Integrated Container Service, Inc.* and held:

> Neither decision considered that reliance on local

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[13] *See Rea B Shipping Corp. v. Uiterwyk Lines*, 1983 A.M.C. 544 (D. Md. 1982); *La Banca v. Ostermunchner*, 1982 A.M.C. 205 (5th Cir. 1981); *Integrated Container Service, Inc. v. Starlines Container Shipping, Ltd.*, 1980 A.M.C. 736 (S.D. N.Y. 1979); and *Yu Sheng Fishery v. Dongwon Industries*, 1993 A.M.C. 110 (D. Guam 1991); *FEDCOM v. Revelen International, Inc.*, 1993 AMC 2435 (D. Me. 1993).

> statutory substitute service upon a secretary of state therefore would eliminate the second half of the judicial two-prong test defining "found within the district" in 55[14] of 94 district courts, or the policy drawback against such a widespread and illogical curtailment of admiralty jurisdiction. Here, the issue arguably arises and the Court holds that the availability of statutory long-arm substitute service upon the Guam Director of Revenue and Taxation does not render a defendant "found within the district" as used in the Federal Rules of Civil Procedure, Supplemental Rule B(1).[15]

1993 A.M.C. at 114.

The Fourth Circuit's interpretation of the local admiralty rule is clearly inconsistent with the opinion in *Yu Sheng Fishery*. The decisions in *La Banca* and *FEDCOM* also support the position that the interpretation of Rule B, and the local admiralty rules which define its terms, has become inconsistent by courts in recent years. It is appropriate and necessary for this Court to resolve this inconsistency at this time.

---

[14] The statutory agent for service under long-arm statutes is located within the geographic boundaries of 55 districts, including all 50 states, Guam, Virgin Islands, Puerto Rico, District of Columbia and Northern Mariana Islands.

[15] The District of Guam's local admiralty rules contain a provision which defines "found within the district" in a manner similar to our LAR b(1). The local rule is not mentioned in the *Yu Sheng Fishery* decision.

D. Whether the "two pronged test" established by federal courts to determine if a defendant is found within the district, may be abolished by local admiralty rules which use the applicability of state long-arm statutes to determine jurisdiction?

The two-prong test previously described has become the standard of Rule B jurisprudence. *LaBanca v. Ostermuncher*, 664 F.2d 65 (5th Cir. 1981); *State of Oregon By and Through State Highway Commission v. Tug Go Getter*, 398 F.2d 873 (9th Cir. 1968); *Seawind Compania, S.A. v. Crescent Line, Inc.*, 320 F.2d 580 (2d Cir. 1963); *K/S DITLEV v. Egeria S.P.A.*, 1982 AMC 1817 (E.D. Va. 1982); *Metal Transport v. Canadian Transport Co.*, 526 F. Supp. 234 (S.D. N.Y. 1981).

The first prong of this test, whether the defendant is transacting business in a manner which justifies the exercise of *in personam* jurisdiction, has been completely enveloped by the local rule's definition of "found within the district." This analysis ignores the nature of the business transacted and instead relies solely upon the state long-arm statutes.

If the local rule is left to stand in its current form, Rule B attachments will essentially no longer be available in the various districts because they will be easily defeated by a defendant who - after the fact - can point to virtually any prior conduct in the district which satisfies the local long-arm statutes.

CONCLUSION

The Fourth Circuit's interpretation of the local admiralty rule has eroded the protection afforded by Rule B in the Eastern District of Virginia and, if followed elsewhere, could lead to a further erosion of the Rule B remedy, traditionally

a critically important procedural protection for maritime creditors dealing with foreign debtors. This is true primarily because local admiralty rules have been adopted by district courts which permit long-arm statutes, intended to enhance the rights of creditors to obtain jurisdiction over scoff-law debtors, to defeat the only meaningful remedy available to maritime creditors.

These local rules have been adopted despite the lack of explicit authority in the admiralty rules or federal maritime jurisprudence to so limit the use of maritime attachment. Consequently, petitioners respectfully request that this Honorable Court consider the impact of local admiralty rules, and the developing restrictive jurisprudence regarding the continued availability of maritime attachment as a remedy in the United States.

Respectfully Submitted,

MARITRANS OPERATING PARTNERS, L.P., BOUCHARD TRANSPORTATION CO. LTD., TUG CAPT FRED S. BOUCHARD CORP., and BARGE NO. B-155 CORP.

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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MARITRANS OPERATING PARTNERS, L.P., *et al.*
Petitioners,

v.

M/V BALSA 37, *et al.*
Respondents.

Petition for Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MARITRANS OPERATING PARTNERS LIMITED PARTNERSHIP,

Plaintiff-Appellee,

v. No.93-2063

The M/V BALSA 37, her engines, tackle, furnishings, etc., in rem; TSACABA SHIPPING COMPANY, INCORPORATED, in personam; DOWA LINE COMPANY, LIMITED, in personam,

Defendants-Appellants.

BOUCHARD TRANSPORTATION COMPANY, INCORPORATED; TUG CAPTAIN FRED S. BOUCHARD CORPORATION; BARGE B. No. 155 CORPORATION,

Plaintiffs-Appellees,

v. No. 93-2068

THE M/V/ BALSA 37, her engines, tackle, furnishings, etc., in rem; TSACABA SHIPPING COMPANY, INCORPORATED, in personam; DOWA LINE COMPANY, LIMITED, in personam,

Defendants-Appellants.

MARITRANS OPERATING PARTNERS LIMITED PARTNERSHIP; BOUCHARD TRANSPORTATION COMPANY, INCORPORATED; TUG CAPTAIN FRED S. BOUCHARD CORPORATION; BARGE B. No. 155 CORPORATION,

Plaintiffs-Appellees,

v. No. 93-2201

THE M/V/ BALSA 37, her engines, tackle, furnishings, etc., in rem; TSACABA SHIPPING COMPANY, INCORPORATED, in personam; DOWA LINE COMPANY, LIMITED, in personam,

Defendants-Appellants.

Appeals from the United States District Court
for the Eastern District of Virginia, at Norfolk.
Henry C. Morgan, Jr., District Judge.
(CA-93-868-N, CA-93-869-N)

Argued: April 13, 1994

Decided: September 5, 1995

Before WIDENER and LUTTIG, Circuit Judges, and TURK, United States District Judge for the Western District of Virginia, sitting by designation.

Reversed by published opinion. Judge Widener wrote the opinion, in which Judge Luttig and Judge Turk concurred.

COUNSEL

ARGUED: Walter Bramblette Martin, Jr., VANDEVENTER, BLACK, MEREDITH & MARTIN, Norfolk, Virginia, for Appellants. John R. Crumpler, Jr., KAUFMAN & CANOLES, P.C., Norfolk, Virginia, for Appellees. **ON BRIEF**: Patrick H. O'Donnell, KAUFMAN & CANOLES, P.C., Norfolk, Virginia; James L. Chapman, IV, David H. Sump, CRENSHAW, WARE & MARTIN, P.L.C., Norfolk, Virginia; William L. Juska, Jr., FREEHILL, HOGAN & MAHAR, New York, New York, for Appellees.

OPINION

WIDENER, Circuit Judge:

This case is before us on a certified interlocutory appeal, pursuant to 28 U.S.C. § 1292 (b), from the United States District Court for the Eastern District of Virginia. We are asked to review the attachment of a vessel pursuant to Supplemental Admiralty Rule B of the federal rules and Local Admiralty Rule (b)(1) of the Eastern District of Virginia. Because we read the local rule literally, we answer the certified question in the affirmative, and the district court's August 25, 1993 order of attachment must be quashed.

I

On August 10, 1993, a shipping accident occurred in Tampa Bay, Florida, involving an out-going cargo vessel (the M/V BALSA 37), owned by Tsacaba Shipping Co. (Tsacaba) and operated by Dowa Line Co. (Dowa), and two incoming tugs and barges, one owned by Bouchard Transportation Company, Inc. (Bouchard) and the other by Maritrans

Operating Partners, L.P. (Maritrans).[1] The collision caused physical damage to both barges and resulted in a substantial oil spill. On August 11 and 17, respectively, Maritrans and Bouchard filed complaints in the United States District Court for the Middle District of Florida against Tsacaba and Dowa *in personam,* and the M/V BALSA 37 *in rem* asserting that the M/V BALSA 37 was at fault in the collision.[2] Both plaintiffs alleged that Tsacaba was liable for the physical damage caused by the collision and the anticipated liability to third parties arising from the oil spill.[3]

On August 17, apparently in an effort to ensure payment of any future judgment against the foreign companies,[4] Maritrans filed a verified complaint in the Eastern District of Virginia seeking to attach, under Supplemental Admiralty Rule B(1), a vessel (the M/V

---

[1]An unexpected maneuver of the M/V BALSA 37 allegedly caused Maritrans' tug and barge to turn and strike the Bouchard tug and barge.

[2]We may hereafter refer to plaintiffs-appellees Bouchard and Maritrans collectively as "Maritrans" and defendants-appellants Tsacaba, Dowa and the M/V BALSA 37 as "Tsacaba."

[3]In addition to physical damage valuations and repairs, Bouchard has claimed cleanup costs of approximately $16 million and Maritrans has claimed such costs in excess of $12 million.

[4]Defendant-appellant Tsacaba has its principal place of business in Manila, Philippines.

BALSA 39)[5] owned by Tsacaba which was currently in waters within the Eastern District, of Virginia. Rule B of the Federal Supplemental Rules for Certain Admiralty and Maritime Claims provides, in pertinent part, for attachment of vessels as follows:

> *(1) When Available; Complaint, Affidavit, Judicial Authorization, and Process.* With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees to be named in the process to the amount sued for, *if the defendant shall not be found within the district.* Such a complaint shall be accompanied by an affidavit signed by the plaintiff or the plaintiff's attorney that, to the affiant's knowledge, or to the best of the affiant's information and belief, the defendant cannot be found within the district. The verified complaint shall be reviewed by the court and, if the conditions set forth in this rule appear to exist, an order so stating and authorizing process of attachment and garnishment shall issue. (emphasis added)

In accordance with Rule B, Maritrans filed an affidavit stating that upon diligent efforts and inquiry, Tsacaba could not be found within the district. Upon finding the verified complaint and affidavit in compliance with Supplemental Admiralty Rule B, the district court issued an order directing the clerk to issue process of attachment. The attachment was

---

[5]The M/V BALSA 39 was not involved in the Tampa Bay collision.

served on the M/V BALSA 39 by the U.S. Marshall at approximately 6:00 a.m. on August 20 as the vessel passed through the Virginia Capes inbound for Baltimore. The ship then went to Newport News, Virginia and moored.

Later that same day, Tsacaba made a motion to quash the attachment and the district court immediately held a hearing. Tsacaba argued that a Rule B attachment was improper because it was "found within the district" within the meaning of Admiralty Rule B because there were two statutory agents, the Secretary of the Commonwealth and the Clerk of the State Corporation Commission, who were available for service of process within the district. Tsacaba also argued that an attachment requested merely to gain security over a foreign defendant is not proper under Admiralty Rule B. The court, ruling from the bench, denied the motion to quash but required Maritrans to post a $100,000 bond by Monday, August 23, to cover the costs and expenses of the attachment. A bond hearing for release of the vessel was also set for Monday, August 23.

At the August 23 hearing the court allowed Tsacaba to reargue its motion to quash the attachment. Tsacaba argued that Local Admiralty Rule (b)(1)[6] for the Eastern District of Virginia defined "not found within the district" under Rule B so that the availability of service of process on a statutorily appointed agent pursuant to Rule 4(d) (the Clerk of the Corporation Commission) deemed it found within the district making the attachment improper. By written order dated August 25, the court denied Tsacaba's motion to quash the writ of attachment under the local rule. The court reasoned that allowing substituted service of process under Rule 4(d) to satisfy the Rule B "not found within the district"

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[6]The full text of the Eastern District of Virginia's Local Admiralty Rule (b)(1) is set out in Part II of this opinion.

language as interpreted by Local Rule (b)(1) would defeat the intent of a Rule B admiralty attachment because such attachment could be defeated in any case where a defendant did business in the district. The court also required Maritrans to post a $100,000 bond as security for costs to preserve the attachment; set bond in the amount of $3.6 million for release of the vessel under Rule E(5) of the Supplemental Rules for Certain Admiralty and Maritime Claims; and transferred the case to the Middle District of Florida.[7]

On August 24, Tsacaba sent a letter to the court requesting reconsideration of the decision denying the quashing of the attachment, and also filed an emergency appeal to this court. On August 27 this court, having no jurisdiction, declined to stay the order denying the motion to quash. Later that day, Tsacaba put up the bond and the M/V BALSA 39 was released. On August 30, the district court heard Tsacaba's motion to reconsider its August 23 decision and Tsacaba's motion to certify the issue on interlocutory appeal pursuant to 28 U.S.C. § 1292(b). By order dated August 31, 1993, the court refused to reconsider its August 25 ruling that Tsacaba was not found within the district under Supplemental Admiralty Rule B. It found explicitly that "...for the purposes of this motion to quash, defendants Tsacaba and Dowa did business in Virginia." By separate order on that date, the district court found that its decision not to vacate the attachment of the M/V BALSA involved a controlling question of law as to which there was substantial grounds for difference of opinion and thus certified an immediate appeal to this court.

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[7]The order to transfer was vacated on August 31 so that the court could consider the motion to reconsider and certify.

II

The question certified to this court is:

> If the defendants are correctly found by the court to be doing business in this District at the time of a Rule B attachment, should Local Admiralty Rule (b)(1) be read in conjunction with Supplemental Admiralty Rule B so as to render the availability of service upon the Clerk of the Virginia State Corporation Commission as meaning that the defendants may be found within the District as that term is used under Rule B. If the answer is in the affirmative, the attachment must be quashed.

The interpretation of Supplemental Admiralty Rule B and Local Admiralty Rule (b)(1) is a legal question which we review *de novo*.[8] See *Marex Titantix, Inc. v Wrecked & Abandoned Vessel*, 2 F3d 544, 545-46 (4th Cir. 1993).

Rule B of the Supplemental Rules for Certain

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[8]Maritrans initially argues that the certified question need not be reached because Tsacaba was not "transacting business" in Virginia such that any statutory agent was subject to service of process under the longarm statute, and thus Tsacaba was not "found within the district" for purposes of Rule B. This argument is without merit. On the facts provided in Maritrans' sworn affidavit and verified complaint, the district court properly found that Tsacaba was doing business in the Commonwealth and the court was correct in not allowing Maritrans to change the affidavit facts later for purposes of defeating Tsacaba's motion to quash the attachment.

Admiralty and Maritime Claims provides for attachment of a defendant's goods and chattels "*if the defendant shall not be found within the district.*" Fed. R. Civ. P. Supp. Admr. Rule B. As the Advisory Committee's Notes point out, the rules have never defined nor do the notes attempt to define the clause "shall not be found within the district." Instead the subject is left for development on a case-by-case basis.[9] Rule B Advisory Committee's Notes. The Eastern District of Virginia has chosen to define the clause in its Local Admiralty Rules (LAR) for cases in its jurisdiction as follows:

> *LAR (b)(1) "Not Found Within the District" Defined.* A defendant is considered to be "not found within the district" if, in an action in personam, the defendant *cannot be served with the summons and complaint as provided in Federal Rule 4(d).*

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[9]In jurisdictions in which there is no local admiralty rule on point, federal case law has developed a two part test for determining whether a defendant can be found "within the district." First, can the defendant be found within the district in terms of jurisdiction (minimum contacts), and second, can the defendant be found within the district for service of process. If the answer to both is yes, the defendant can be found within the district and the attachment is not proper. See *La Banca v. Ostermunchner*, 664 F.2d 65, 67 (11th Cir. 1981); *Seawind Compania, S.A. v. Crescent Line, Inc.*, 320 F.2d 580, (2d Cir. 1963); *K/S Ditlev Chartering A/S & Co. v. Egeria*, 1982 AMC 1817, 1818 (E.D. Va 1982) (decided prior to adoption of the Local Admiralty Rules in February 1989). We note that *Seawind Compania* apparently held that a statutory agent with a *State*, although in a different district, would mean that the defendant was nevertheless "found within the district."

E.D. VA. ADMR. R. (b)(1) (emphasis added). It follows that, under the Local Rule attachment pursuant to Rule B is not proper if a defendant can be served in accordance with Fed.R.Civ.P.4(d).[10] Rule 4(d),[11] of course, provides for service of process upon a foreign corporation

> by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or *to any other agent authorized by appointment or by law to receive service of process* and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant[.]

(Emphasis added). Tsacaba contends that because the Clerk of the State Corporation Commission is statutorily appointed under the Virginia Code to accept service of process, he is found within the district under Supplemental Admiralty Rule B as interpreted by LAR (1)(b). We agree, Virginia Code Section 13.1-758F provides for substituted service on the Clerk of the State Corporation Commission where a foreign corporation without certificate of authority transacts business in the Commonwealth but has no director, officer or agent

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[10]We note that service of process under the methods provided in Fed.R.Civ.P.4(d) has been acknowledged as satisfying the Rule B "not found within the district" language under the federal case law where the jurisdiction prong (minimum contacts) has also been met. *Seawind Compania, S.A.*, 320 F.2d at 582.

[11]As of the 1993 amendments to the Federal Rules of Civil Procedure, the substance of former Rule 4(d) relating to service on foreign corporations is now contained in Rule 4(h).

within the Commonwealth on which to serve process.[12] Clearly, Maritrans had an agent authorized by law upon which to serve process under Rule 4(d), and thus does not fall within the LAR's definition of "not found within the district" under Admiralty Rule B. Accordingly, the attachment should not have issued, because a statutory agent, the Clerk of Commission, was found within the district, in Richmond.

The district court chose not to follow this plain reading of the Local Admiralty Rule, noting that the policy

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[12]The Virginia State Code Section authorizing substituted service applicable under the facts of this case read in pertinent part:

> *§ 13.1-758. Consequences of transacting business without authority.* F. Suits, actions and proceedings may be begun against a foreign corporation that transacts business in this Commonwealth without a certificate of authority by serving process on any director, officer or agent of the corporation doing such business, or, if none can be found, *on the clerk of the Commission.* If any foreign corporation transacts business in this Commonwealth without a certificate of authority, it shall be transacting such business be deemed to have thereby appointed the clerk of Commission its attorney for service of process (italics added).

We note that § 8.01-329, authorizing substituted service on the Secretary of the Commonwealth, does not apply in this case because the provisions of § 8.01-328.1 do not, apply under the facts of this case.

of quick and easy maritime attachments under Rule B would be thwarted if a defendant was found within the district by service of process on all statutory substituted agents. Where the federal rule and the local rule are not inconsistent, which these are not, the clear language of the local rule dictates our decision, and we leave any modification of the local rule to the district which promulgated it. See Fed.R.Civ.P. 83 (permitting each district to adopt local rules not inconsistent with the Federal Rules); *Jackson v. Beard*, 828 F.2d 1077, 1078-80 (4th Cir. 1987) (local rules have the force and effect of law and are binding upon the parties and the court which promulgated them) (citation omitted).[13]

The order of the district court appealed from is accordingly

REVERSED.

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[13]We note that our decision is consistent with that of the 11th Circuit in *LaBanca v. Ostermunchner*, 664 F.2d 65 (11th Cir. 1981), which utilized the two-prong case law test for determining if a defendant is found within the district under Rule B. In *LaBanca*, the court simply held that a defendant is not "found within the district" by statutory service of process on the Secretary of the State where the Secretary is not susceptible to actual service within the district in which the attachment is sought. *Id.* at 67-68. Interestingly, the Eleventh Circuit noted that although this decision creates an odd distinction between single district and multi-district States, it believed that such distinction was "intended by Congress and is consistent with traditional admiralty practice." *Id.* at 68 n.4.

Filed: October 10, 1995

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Nos. 93-2063 (L)
(CA-93-868-N, CA-93-869-N)

MARITRANS OPERATING PARTNERS LIMITED PARTNERSHIP,

Plaintiff-Appellee,

versus

THE M/V BALSA 37, etc., et al,

Defendants-Appellants.

ORDER

The Court amends its opinion filed September 5, 1995, as follows:

On page 5, first paragraph, line 6 - - the word "Marshall" is corrected to read "Marshal."

For the Court - By Direction

/s/ Bert M. Montague
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CIVIL ACTION NO. 2:93CV869

BOUCHARD TRANSPORTATION, CO., INC.,
TUG CAPT. FRED S. BOUCHARD CORP., and
BARGE B. NO. 155 CORP.,

Plaintiffs,

v.
THE M/V BALSA 37, her engines,
tackle, furnishings, etc., in rem,
TSACABA SHIPPING CO., INC., and
DOWA LINE CO., LTD., in personam,

Defendants.

MARITRANS OPERATING PARTNERS, L.P.,

Plaintiff,

v.

CIVIL ACTION NO. 2:93CV868

THE M/V BALSA 37, her engines,
tackle, furnishings, etc., in rem,
TSACABA SHIPPING CO., INC., and
DOWA LINE CO., LTD., in personam,

Defendants.

OPINION AND ORDER

FACTS AND PROCEDURAL BACKGROUND

On August 11, 1993, plaintiff Maritrans Operating Partners, L.P. ("Maritrans") filed a complaint against defendants in the United States District Court for the Middle District of Florida, asserting that the M/V BALSA 37 was at fault in a maritime collision which occurred in the mouth of Tampa Bay.[1] Plaintiffs alleged that the defendants are liable for the physical damages caused by the collision, as well as anticipated liability to third parties arising from the resulting oil spill. On August 17, 1993, plaintiffs Bouchard Transportation Company, the Capt. Fred S. Bouchard Corporation, and Barge B No. 155 Corporation ("Bouchard") filed a similar complaint against the defendants in the United States District Court for the Middle District of Florida based upon the same incident.

On August 19, Maritrans and Bouchard sought from this court orders under Rule B(1) of the Supplemental Rules for Certain Admiralty and Maritime Claims ("Rule B") directing the clerk to issue process of attachment on the M/V BALSA 39, a sister ship of the M/V BALSA 37, which was also owned by defendants. Plaintiffs provided this court with verified complaints and sworn affidavits stating that the defendants could not be found within the district and that diligent efforts had been made to locate defendants within the

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[1]The defendants are Dowa Line Company, Ltd. ("Dowa"), Tsacaba Shipping Company, Inc. ("Tsacaba"), and the M/V BALSA 37, her engines, tackle, furnishings, etc., in rem. The M/V BALSA 37 was the ship alleged to be at fault in the collision which gave rise to plaintiffs' claim. Her sister ship, the M/V BALSA 39, was the ship which was attached pursuant to Rule B, infra.

district without success. The Court found that the complaints and affidavits complied with Rule B and issued the requested orders. The M/V BALSA 39 was served with the orders by the United States Marshal when the ship met its Baltimore pilot. The Marshal was accompanied by a Hampton Roads pilot who navigated the vessel to a berth in Newport News, Virginia. A few hours after the M/V BALSA 39 was served with the writ of attachment, defendants filed an answer to the complaint in the Middle District of Florida.

On August 20, 1993, defendants moved for the Court to quash the writ of attachment on the grounds that defendants could be found within the district within the meaning of Rule B. The Court denied the motion, but required plaintiffs to post a bond in the amount of One Hundred Thousand Dollars ($100,000) to cover the costs of the attachment. On August 23, 1993, the Court denied defendants' request for the Court to reconsider quashing the writ, and the Court set a bond in the amount of Three Million, Six Hundred Thousand Dollars ($3.6 million) in order for defendants to obtain release of the vessel under Rule E(5) of the Supplemental Rules for Certain Admiralty and Maritime Claims ("Rule E(5)"). On August 25, 1993, the Court issued a written order and opinion concerning each of the aforementioned actions.

Defendants sought appellate review of this Court's decisions pursuant to 28 U.S.C. § 1292(a) (3).[2] Judge H. Emory Widener, Jr., of the United States Court of Appeals

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[2]28 U.S.C. § 1292(a) (3) provides that: "(a) . . . the courts of appeals shall have jurisdiction of appeals from: . . . (3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed."

for the Fourth Circuit declined to hear defendants' appeal on the ground that this Court's decisions were not appealable on an interlocutory basis under 28 U.S.C. §1292(a) (3).

DISCUSSION AND RULINGS

Defendants now come before the Court again seeking to quash the writ of attachment, and to obtain this Court's certification to obtain an interlocutory appeal pursuant to 28 U.S.C. § 1292(b).[3]

I. Prior Order to Transfer Vacated for Purposes of Considering Motions Before Court

In this Court's order of August 25, 1993, the Court directed that both of the above styled actions be transferred upon the posting of the bond required for release of the vessel or upon the vessel's departure from the district by other lawful means. Bonds have been posted and the vessel has departed the district. Inasmuch as the transfer of the cases has not yet been completed, the Court hereby VACATES that portion of its prior order directing a transfer in order to consider the motions now before it.

II. Defendants' Motion to Quash Writ of Attachment on Grounds of Newly Discovered Evidence

Defendants contend that they have acquired new evidence that would justify this Court's quashing of the writ of attachment. Specifically, defendants contend that it was only on August 27, 1993, that they discovered that the Clerk of the Florida State Corporation Commission had been served with substituted service on behalf of the defendants in the

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[3]The Court will grant defendants' request for certification, which is the subject of a separate order.

action filed by the Bouchard plaintiffs before the attachment was issued. Thus, defendants contend, a forum already existed in which a court had personal jurisdiction over the defendants at the time the attachment was issued. For that reason, defendants contend the attachment was improper and should now be quashed because the attachment was not necessary to obtain jurisdiction over the defendants.

Even assuming the evidence presented by the defendants qualifies as newly discovered evidence, the Court DENIES defendants' motion to quash. The mere fact that a request for substituted service had been made by one of the plaintiffs did not of itself conclusively establish that jurisdiction had actually been obtained over both defendants by both of the plaintiffs. The Bouchard plaintiffs had no assurance at the time the writ of attachment was issued that they had successfully obtained jurisdiction over the defendants in the Middle District of Florida action, and the Maritrans plaintiffs had not sought substituted service in the Florida action.

Other courts have held that even where personal jurisdiction over defendants is later shown to have been successfully been obtained in another district, a properly issued writ of attachment will not be quashed unless it was apparent before the writ was executed that personal jurisdiction had been clearly established in another district. Thus, in Narada Shipping, Ltd. v. North Atlantic Oil, Ltd., 398 F. Supp. 95 (S.D. Ala. 1975), the defendant filed an answer and submitted to the in personam jurisdiction of the Court before the writ of attachment was executed. The Court held that the answer effectively established personal jurisdiction over the defendants and was therefore grounds to quash the attachment since jurisdiction was established before the writ was executed. Id. at 96.

Unlike the Narada Shipping defendants, however, defendants in this action did not file an answer and make a general appearance until after the writ was executed. Until the answer was filed, defendants could still contest the propriety of service and the existence of in personam jurisdiction. See also Cocotos Steamship of Panama, S.A. v. Sociedad Maritima Victoria S.A. Panama, 146 F. Supp. 540, 542 (S.D.N.Y. 1956) (appearance by defendant prior to execution of writ was grounds to quash attachment).

Whereas the filing of an answer by the defendants which consents to personal jurisdiction will clearly establish such jurisdiction and therefore defeat a motion for attachment if made before the writ is executed, a mere request for substituted service on the Clerk of the State Corporation Commission under a long-arm statute does not clearly establish jurisdiction so as to defeat a Rule B motion for attachment. To hold otherwise would defeat the purposes of Rule B and place plaintiffs in a precarious position where, having made efforts in one locality to effect substituted service, they would be subsequently hampered in efforts to use Rule B attachment proceedings in another district even though they had no assurance that the substituted service had been effective. Therefore, the Court declines to quash the writ of attachment on this basis.

Defendants have again requested this Court to revisit the question of whether the defendants were "found within the district" for Rule B purposes because the plaintiffs could have served the Secretary of the Commonwealth or the Clerk of the State Corporation Commission pursuant to Virginia statutes since defendants were doing business in Virginia. Plaintiffs similarly request the Court to revisit the question of whether defendants did business in Virginia. Plaintiffs contend that defendants did not present testimonial evidence showing that defendant Tsacaba conducted any business in

Virginia other than the fact that some ships owned by Tsacaba called in Virginia ports. Defendants' testimonial evidence pertained directly to the activities of defendant Dowa only. The Court FINDS that, for the purposes of this motion to quash, defendants Tsacaba and Dowa did business in Virginia. The plaintiffs have alleged in their pleadings that Tsacaba was " . . . owner, operator, manager, or otherwise in control of" the BALSA 37, and they cannot now be heard to argue otherwise for purposes of this motion. The Court declines the defendants' request to reconsider the question of whether they should have been deemed found within the district.

III. Amendment of Order Requiring Posting of Bond

In its prior orders of August 20 and August 23 respectively, this Court directed the plaintiffs and defendants to post bonds. Defendants were directed to post a bond in the amount of Three Million, Six Hundred Thousand Dollars ($3.6 million) in order to release the vessel pursuant to Rule E(5), and plaintiffs were directed to post a bond in the amount of One Hundred Thousand Dollars ($100,000) for their possible liability to the defendants for the costs of the attachment pursuant to Rule E(2)(b).

The parties have since stipulated as to the form of the bond by mutually agreeing that a letter of undertaking will be deemed acceptable. The Court FINDS that the agreed to letters of undertaking and bonds filed with the Clerk satisfy the requirement of its prior orders.

IV. Consolidation of Cases

In the interest of expediting this lawsuit and for the convenience of the parties, the Court GRANTS the Plaintiff's Motion to Consolidate these actions and DIRECTS the Clerk

to consolidate the two actions styled as Civil Actions NOS. 2:93CV868 and 2:93CV869.

V. Transfer of Consolidated Case

The clerk is DIRECTED to transfer the consolidated case to the United States District Court for the Middle District of Florida, pursuant to 28 U.S.C. § 1404, subject to the action of the United States Court of Appeals for the Fourth Circuit in response to the certification of this action for interlocutory appeal by Order entered simultaneously herewith.

The clerk is REQUESTED to mail a copy of this Order to counsel of record.

It is so ORDERED.

/s/ Henry C. Morgan, Jr.
United States District Judge

At Norfolk, Virginia
August 31st, 1993.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CIVIL ACTION NO. 2:93CV869

BOUCHARD TRANSPORTATION, CO., INC.,
TUG CAPT. FRED S. BOUCHARD CORP., and
BARGE B. NO. 155 CORP.,

Plaintiffs,

v.

THE M/V BALSA 37, her engines,
tackle, furnishings, etc., in rem,
TSACABA SHIPPING CO., INC., and
DOWA LINE CO., LTD., in personam,

Defendants.

MARITRANS OPERATING PARTNERS, L.P.,

Plaintiff,

CIVIL ACTION NO. 2:93CV868

v.

THE M/V BALSA 37, her engines,
tackle, furnishings, etc., in rem,
TSACABA SHIPPING CO., INC., and
DOWA LINE CO., LTD., in personam,

Defendants.

OPINION AND ORDER

FACTS AND PROCEDURAL BACKGROUND

On August 11, 1993, plaintiff Maritrans Operating Partners, L.P. ("Maritrans") filed a complaint against defendants in the United States District Court for the Middle District of Florida, asserting that the M/V BALSA 37 was at fault in a maritime collision which occurred in the mouth of Tampa Bay.[1] Plaintiffs alleged that the defendants are liable for the physical damages caused by the collision, as well as anticipated liability to third parties arising from the resulting oil spill. On August 17, 1993, plaintiffs Bouchard Transportation Company, the Capt. Fred S. Bouchard Corporation, and Barge B No. 155 Corporation ("Bouchard") filed a similar complaint against the defendants in the United States District Court for the Middle District of Florida based upon the same incident.

On August 19, Maritrans and Bouchard sought from this court orders under Rule B(1) of the Supplemental Rules for Certain Admiralty and Maritime Claims ("Rule B") directing the clerk to issue process of attachment on the M/V BALSA 39, a sister ship of the M/V BALSA 37, which was

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[1]The defendants are Dowa Line Company, Ltd. ("Dowa"), Tsacaba Shipping Company, Inc. ("Tsacaba"), and the M/V BALSA 37, her engines, tackle, furnishings, etc., in rem. The M/V BALSA 37 was the ship alleged to be at fault in the collision which gave rise to plaintiffs' claim. Her sister ship, the M/V BALSA 39, was the ship which was attached pursuant to Rule B, infra.

also owned by defendants.[2]

Plaintiffs provided this court with verified complaints and sworn affidavits stating that the defendants could not be found within the district and that diligent efforts had been made to locate defendants within the district without success. The Court found that the complaints and affidavits complied with Rule B and issued the requested orders. The M/V BALSA 39 was served with the orders by the United States Marshal when the ship met its Baltimore pilot. The Marshall was accompanied by a Hampton Roads pilot who navigated the vessel to a berth in Newport News, Virginia, where it remains pending further action of this Court or the posting of a bond pursuant to Rule E(5)(a) or (b) of the Supplemental Rules for Certain Admiralty and Maritime Claims ("Rule E"). A few hours after the M/V BALSA 39 was served with the writ of attachment, defendants filed an answer to the complaint in the Middle District of Florida.

DISCUSSION AND RULINGS

I. Defendant's Motion to Quash Writ of Attachment

On August 20, the defendants filed a motion to quash the attachment in this court on two grounds. First, the defendants argue that they are present in the district and the plaintiffs should have found and served them had they exercised due diligence. Second, defendants argue that they have now filed an answer to the complaint which was filed

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[2]In oral argument concerning the issue of whether defendants had designed an agent in this district for accepting service of process, counsel for the parties indicated some disagreement regarding which defendant owns and which defendant operates these vessels. The Court does not address this issue in this order.

in the United States District Court for the Middle District of Florida. Thus, defendants contend that inasmuch as they have now submitted to personal jurisdiction in another forum, the writ of attachment obtained to gain personal jurisdiction over them in this court should be quashed.

The court DENIES defendant's motion to quash the writ of attachment. The court finds that the writ was properly issued in the first instance since the defendants could not be found within the district within the meaning of Rule B.

The defendants presented testimonial evidence that M/V BALSA 37 and M/V BALSA 39 and defendant Dowa frequently utilized a shipping agent in the Hampton Roads area. The agent, T. Parker Host, Jr., admitted that he has never been appointed by Dowa for the purpose of accepting service of process and, in fact, has never accepted service of process for Dowa. There was no mention of the co-defendant Tsacaba. The Court FINDS that Mr. Host does not qualify as a person upon whom valid process could have been served for either of the defendants as of August 19, 1993.

Defendants further contend that under FED. R. CIV. P. 4(d)(3), plaintiffs could have obtained jurisdiction over the defendants by filing the complaint with the Secretary of the Commonwealth pursuant to Virginia's long-arm statute. See VA. CODE §§ 8.01-328.1; 8.01-329 (Michie 1992). According to the defendants, the ability of plaintiffs to use this procedure thereby renders the defendants "found within the district" within the meaning of Rule B(1). Defendants further rely upon the language of the United States District Court for the Eastern District of Virginia's Local Admiralty Rule (b)(1) ("LAR (b)(1)"), which states: "A defendant is considered to be 'not found within the district' if, in an

action in personam, the defendant cannot be served with the summons and complaint as provided in Federal Rule 4(d)."

Under the defendants' construction of LAR(b)(1), this court's local rule places the burden on the plaintiff to exhaust all possible means of obtaining in personam jurisdiction within the district before seeking an attachment under Rule B. This Court finds that such a burden will frustrate the intent and purpose of Rule B.

In this case neither defendant has offered evidence that it has qualified to do business in Virginia, maintained any business address in Virginia, appointed a statutory (registered) agent in Virginia or had any officer or employee in Virginia. Under such circumstances, the plaintiffs' affidavits filed pursuant to Rule B, stating that the defendants cannot be found within the district are construed to satisfy LAR(b)(1), as well as Rule B. Therefore, the Court FINDS that the writ of attachment was properly granted in the first instance.

The defendants argue that it has been shown that each could have been served in personam in Virginia and their motion to quash should now be granted notwithstanding the Court's finding that the initial granting of the attachment was proper. The Court FINDS that the filing of an accurate Rule B affidavit places the burden upon the defendants to demonstrate that they can be found within the district.

The defendants contend that the availability of service on the Secretary of the Commonwealth means that they may be found within the district since the Secretary is headquartered in the City of Richmond which lies within the district. The Court disagrees. The very purpose of the Virginia long arm statute and its correlative provision for substituted service on the Secretary is to provide an

alternative method of service in situations where a defendant may not be found within the Commonwealth or, in the instant case, may not be found within the district.

There is a logical reason for the "found within the district" clause. If this Court were to require plaintiffs to conduct an investigation to determine whether each potential defendant in a Rule B attachment did sufficient business in the State or district to justify substituted service,[3] one of the purposed of the rule would be frustrated. Any defendant would have the time and opportunity to remove its property from the state or district while such an investigation was being conducted. If plaintiffs served the Secretary without sufficient evidence of a defendant's having done business in the jurisdiction they would be faced with motions to quash service and potential motions for sanctions. In either case, both the purpose of Rule B and the general purpose of the Federal Rules of Civil Procedure to secure the just, speedy

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[3]The defendants, by counsel, urged the Court to find that the defendants did business in Virginia as both the M/V BALSA 37 and M/V BALSA 39 had called in ports within this district on at least ten (10) occasions in the past five (5) years and further that the shipowners' (Dowa's and Tsacaba's) accounts were still open with their local agent, T. Parker Host, Jr. The procedural posture of this case placed the two parties in the unusual position where the plaintiffs argued that the defendants did not do business in the district, whereas the defendants argued that they did so. The Court accepted the defendants' position and stated from the bench that it was satisfied that the defendants were doing business in Virginia. Therefore, this argument is not available to the plaintiffs to defeat defendants' motion to quash nor may the defendants contend that the attachment is invalid under the minimum contacts requirement of International Shoe Co. v. State of Washington, 326 U.S. 310 (1945).

and inexpensive determination of every action would be frustrated. See FED. R. CIV. P. 1.

In cases where courts have quashed Rule B attachments there has usually been some fault found with the plaintiff's affidavit or the defendants have been able to prove that a public record of their doing business in the district existed and could have been discovered with due diligence. See, e.g., Oregon v. Tug Go Getter, 398 F.2d 873, 875 (9th Cir. 1968) (attachment dissolved where libelant failed to use due diligence in signing its affidavit because of failure to inquire whether defendant companies had an agent or employee upon whom process could be served within the state); Seawind Compania, S.A. v. Crescent Line, Inc., 320 F.2d 580, 583 (2d Cir. 1963) (same). In the instant case no defect has been proven in either plaintiffs' affidavit. Further, no public record has been shown to exist which establishes that either defendant was present within the district. The exhibit tendered by the defendant through T. Parker Host, Jr., made reference to M/V BALSA 37 and M/V BALSA 39, but did not identify either Dowa or Tsacaba by name. Since Mr. Host was not authorized by either defendant or by law to accept service, this record did not inform the plaintiffs where or if the defendants could be found within the district.

Thus, the construction of Rule B and LAR(b)(1) urged by the defendants would create a situation where a Rule B attachment, found proper in all respects, could always be successfully attacked by any person able to prove they had done sufficient business in the district to justify substituted service. This Court FINDS that this construction is not consistent with the wording or the intent of the phrase "found within the district" contained in Rule B.

Accordingly, this Court will not consider the availability of substituted service upon the Secretary of the

Commonwealth as compelling a finding that a defendant may be found within the district pursuant to LAR(b)(1). See Yu Sheng Fishery Co., Ltd. v. Dongwon Indus. Co., Ltd., 1993 A.M.C. 110 (1991) (rejecting argument that opportunity to serve state official under long-arm statute rendered defendant "found within the district" for Rule B purposes). To the extent that the language of LAR(b)(1) compels such a finding this local rule must give way to Rule B. See Rule 1, United States District Court for the Eastern District of Virginia, Local Rules of Practice ("LR 1").[4]

Defendants have brought to the Court's attention several cases in which other courts have suggested that substituted service on a state official under a long-arm statute should be sufficient to establish that a defendant is found within a district. This argument contemplates that the case is pending within the same district where the state official is located who has been appointed under the long-arm statute. See, e.g., LaBanca v. Ostermunchner, 664 F.2d 65, 68 (5th Cir. 1981). As plaintiffs have appropriately noted, each of the cases cited by defendant is distinguishable in that the language relied upon is dicta since the courts never reached the precise issue before this Court.

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[4]LR 1 provides, in pertinent part:

> These rules. . . so far as not inconsistent therewith and so far as applicable, shall govern the practice and procedure in the United States District Court for the Eastern District of Virginia in all suits, causes of actions of a civil nature, cognizable as cases at law or in equity, all criminal cases, and other proceedings in said court (emphasis added).

Further, this Court respectfully disagrees with this construction of these cases. As the Yu Sheng court observed, such a rule [as that proposed by defendant's interpretation of the cited cases] would have the effect of destroying the uniformity of Rule B and making the Rule B attachment procedure rise and fall on the happenstance of whether the statutory agent happens to be in the same district as the court where attachment is sought. Yu Sheng Fishery, 1993 A.M.C. at 113-14. Therefore, in single-district states, Rule B would be almost a nullity, and in multi-district states such as Virginia, the availability of the Rule would depend on the location of the statutory agent. The availability of the attachment remedy under Rule B should not rise or fall on the accidental occurrence of where the governmental official is located or whether a state is a single district or multi-district state.

Therefore, the court FINDS that the writ of attachment will not be quashed on the grounds that the availability of service on the Secretary of the Commonwealth negates the plaintiffs' affidavit that the defendants may not be found within the district.

Defendants' second argument urges that inasmuch as it has now consented to personal jurisdiction in the Middle District of Florida, the only remaining purpose for the attachment in this district is to provide security for the plaintiff. This, defendants argue, is an impermissible purpose under Rule B. The Court does not agree with this argument. Defendants did not submit to the jurisdiction of the Middle District of Florida court until it answered the complaint several hours after the writ of attachment had been served. Therefore, at the time the writ was issued and served, plaintiff was properly engaged in both obtaining security for its claim and personal jurisdiction over defendant. The defendants' late submission to the jurisdiction of an

alternative forum is not grounds to quash the attachment, which was valid when issued. See Swift & Co. Packers v. Compania Colombian Del Caribe, S.A., 339 U.S. 684, 693 (1950) (attachment is not dissolved by subsequent appearance of respondent); Construction Exporting Enterprises, UNECA v. Nikki Maritime, Ltd., 558 F. Supp. 1372 (S.D.N.Y.), appeal dismissed without op., 742 F.2d 1432 (2d Cir. 1983) (filing of general appearance by defendant did not defeat right to attachment based upon premise that vessel owner was not found within the district). Narada Shipping, Ltd. v. North Atlantic Oil, Ltd., 398 F. Supp. 95 (S.D. Ala. 1975) (defendant's submission to court's jurisdiction before marshal took action under writ of attachment was basis for granting defendant's motion to vacate writ of attachment). Therefore, defendants' motion to quash the attachment is DENIED.

II. Requirement for Plaintiffs to Post a Bond to Preserve Attachment

Under Local Admiralty Rule (e)(8) and (9),[5] this

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[5]LAR (e)(8) provides:

> Security for Costs. In an action under Supplemental Rule E, a party may file and serve upon an adverse party a notice to post security for costs. Unless otherwise ordered by the court, the amount of security shall be $500.00. The party notified shall post security within five days after service. A party who fails to post security when due may not participate further in the proceedings, except for the purpose of seeking relief from the order.

LAR (e)(9) provides:

Court has the authority to require plaintiffs to post a bond in the amount necessary to satisfy plaintiffs' potential liability to defendants for costs incurred as a result of the attachment. The court accordingly required the plaintiffs to post a bond in the amount of $100,000, by 5:00 p.m., Eastern Daylight Time, on Monday, August 23, 1993. The bond has now been posted in the form of a letter of undertaking as mutually agreed upon by the parties. Plaintiffs in the two related cases are jointly and severally liable on the bond.

III. Special Bond for Release of Property

Defendants requested the Court to fix the principal sum of the bond required to release the property pursuant to Rule E(5)(a) as the parties were unable to stipulate the amount of the bond. The defendants presented a certificate of appraisal in the amount of Three Million Dollars ($3,000,000) as the value of the property and the plaintiffs presented a similar certificate in the amount of Four Million, Two-Hundred Thousand dollars ($4,200,000). The plaintiffs' claim is in excess of twice the amount of the higher appraisal and the Court therefore ORDERS the principal amount of the bond to be fixed at Three Million Six Hundred Thousand Dollars ($3,600,000). The parties have stipulated that the

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> Increased Security for Costs. A party may apply to the court for an order increasing the among of security for costs. The marshal shall notify the court if a party fails to advance sums as requested, after property has been arrested, attached or garnished, and the marshal may apply to the court for directions if a question arises concerning the obligation of a party to advance moneys required under this rule.

nature of the security shall correspond to the letter of undertaking heretofore posted by the plaintiff.

IV. Transfer of Case

The defendants have established by affidavit that they have filed answers to the complaints in the Middle District of Florida and have thereby submitted to that court's jurisdiction. Since the defendants have now submitted to the jurisdiction of the United States District Court for the Middle District of Florida on the identical claim asserted as the basis for this attachment, the Court ORDERS these cases transferred to the United States District Court for the Middle District of Florida, pursuant to 28 U.S.C. § 1404(a), upon the defendants' posting of the Special Bond provided in Rule E(5)(a) or upon the removal of the vessel from this district by other lawful means.

The clerk is REQUESTED to notify counsel of record by telephone of the filing of this Order, make copies available to all counsel of record, and thereafter mail a copy of this Order to counsel of record.

It is so ORDERED.

/s/ Henry C. Morgan, Jr.
United States District Judge

At Norfolk, Virginia
August 25th, 1993.

Filed: August 27, 1993

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 93-2063

MARITRANS OPERATING PARTNERS, L.P.,
Appellee,

versus

THE M/V BALSA 37, her engines,
tackle, furnishings, etc., in rem,
TSACABA SHIPPING CO., INC., and
DOWA LINE CO., LTD., in personam,
Appellants.

No. 93-2068

BOUCHARD TRANSPORTATION CO., INC.,
TUG CAPT. FRED S. BOUCHARD CORP., and
BARGE B. NO. 155 CORPORATION,
Appellees,

versus

THE M/V BALSA 37, her engines,
tackle, furnishings, etc., in rem,
TSACABA SHIPPING CO., INC., and
DOWA LINE CO., LTD., in personam,
Appellants.

ORDER

M/V Balsa 39 was attached in the waters of Virginia

on account of a collision which one of her sister ships had in Florida waters a short while ago. Her owners are involved in the federal district court in Florida with respect to that collision.

Upon a hearing, the district court in this case declined to dissolve or vacate or quash the attachment of Balsa 39, and it is from that order, apparently entered August 25, 1993, that Balsa 39 and her owners appeal.

In the case of Cushing v. Laird, 107 U.S. 69 (1883), the Supreme Court declined that an appeal by the garnishee from such an attachment in admiralty was an appeal from an interlocutory order of the district court and had been properly dismissed by the circuit court. I find nothing which has altered Cushing. The much more recent case of Swift v. Compania Caribe, 339 U.S. 684 (1950), indeed, has cited Cushing favorably on page 689. Wright, Miller and Cooper, Federal Practice and Procedure, § 3911 (1992), agrees that such orders are not appealable.

Accordingly, I think it unlikely that Balsa 39 or the defendants would succeed in prosecuting an appeal from the order of the district court as it now stands. For that reason, in my opinion, I should not stay the order of the district court or enjoin its enforcement pending appeal.

It is accordingly ADJUDGED and ORDERED that the request for relief pending appeal from the order of the district court appealed from shall be, and the same hereby is, denied. I express no opinion either as to the merits of the appeal or any procedural aspect thereof in the event the district court should certify an interlocutory appeal.

The attorneys have objected to each adverse ruling for every reason which would be supported by the record.

/s/ H. E. Widener, Jr.
U.S. Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CIVIL ACTION NO. 2:93CV869
DOCKET NO.:93:2063

BOUCHARD TRANSPORTATION, CO., INC.,
TUG CAPT. FRED S. BOUCHARD CORP., and
BARGE B. NO. 155 CORP.,

Plaintiffs,

v.

THE M/V BALSA 37, her engines,
tackle, furnishings, etc., in rem,
TSACABA SHIPPING CO., INC., and
DOWA LINE AMERICA CO., LTD., in personam,

Defendants.

CIVIL ACTION NO. 2:93CV868
DOCKET NO.: 93-2063

MARITRANS OPERATING PARTNERS, L.P.,

Plaintiff,

v.

THE M/V BALSA 37, her engines,
tackle, furnishings, etc., in rem,
TSACABA SHIPPING CO., INC., and
DOWA LINE AMERICA CO., LTD., in personam,

Defendant.

ORDER OF RELEASE

WHEREAS the Defendants, Tsacaba Shipping Co., Inc. and Dowa Line America Co., Ltd., have posted bonds in form acceptable to the Clerk of this Court and to the plaintiffs as evidenced by the attached Stipulation, it is hereby

ORDERED that the vessel M/V BALSA 39 be released from the custody of the United States Marshal for the Eastern District of Virginia and the United States Marshal for the Eastern District of Virginia is hereby

ORDERED to release the vessel M/V BALSA 39 immediately from arrest and attachment.

/s/ Doris A. Casey, Clerk
/s/ Jean L. Basnight, Deputy Clerk
~~UNITED STATES DISTRICT COURT JUDGE~~

August 27th, 1993
Norfolk, Virginia
5:52 p.m.

WE ASK FOR THIS:

/s/ R. John Barrett
Walter B. Martin, Jr., Esq. (#4214)
R. John Barrett, Esq. (#20665)
VANDEVENTER, BLACK, MEREDITH & MARTIN
500 World Trade Center
Norfolk, Virginia 23510-1699
DID: (804) 446-8638

SEEN AND AGREED:

/s/ James L. Chapman IV
Counsel for BOUCHARD TRANSPORTATION CO., INC., et al.
James L. Chapman, IV, Esq.
David H. Sump, Esq.
Crenshaw, Ware & Martin, P.L.C.
1200 NationsBank Center
Norfolk, Virginia 23510

/s/ John R. Crumpler
Counsel for MARITRANS OPERATING PARTNERS, L.P.
John R. Crumpler, Jr., Esq.
Patrick H. O'Donnell, Esq.
Kaufman & Canoles, P.C.
2000 NationsBank Center
Post Office Box 3037
Norfolk, Virginia 23514

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CIVIL ACTION NO. 2:93CV869
DOCKET NO.: 93:2063

BOUCHARD TRANSPORTATION, CO., INC.,
TUG CAPT. FRED S. BOUCHARD CORP., and
BARGE B. NO. 155 CORP.,

Plaintiffs,

v.

THE M/V BALSA 37, her engines,
tackle, furnishings, etc., in rem,
TSACABA SHIPPING CO., INC., and
DOWA LINE AMERICA CO., LTD., in personam,

Defendants.

CIVIL ACTION NO. 2:93CV868
DOCKET NO.: 93-2063

MARITRANS OPERATING PARTNERS, L.P.,
Plaintiff,

v.

THE M/V BALSA 37, her engines,
tackle, furnishings, etc., in rem,
TSACABA SHIPPING CO., INC., and
DOWA LINE AMERICA CO., LTD., in personam,
Defendant.

ORDER

UPON MOTION of the Defendants, and the Court being of the opinion that its Memorandum Order of August 25, 1993 involves a controlling question of law as to which there is substantial grounds for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of litigation, hereby CERTIFIES the following question pursuant to the provisions of 28 U.S.C. § 1292(b) which authorizes the appeal of a certified interlocutory order:

> If the defendants are correctly found by the court to be doing business in this District at the time of a Rule B attachment, should Local Admiralty Rule (b)(1) be read in conjunction with Supplemental Admiralty Rule B so as to render the availability of service upon the Clerk of the Virginia State Corporation Commission as meaning that the defendants may be found within the District as that term is used under Rule B. If the answer is in the affirmative, the attachment must be quashed.

To the extent as set forth in this Order, the Court amends its Opinion and Order of August 25, 1993.

To which ruling by the Court, the plaintiffs, by counsel did object and except.

/s/ Henry C. Morgan, Jr.
UNITED STATES DISTRICT COURT JUDGE

August 31st, 1993
Norfolk, Virginia

WE ASK FOR THIS:

/s/ Walter B. Martin, Jr.
Counsel for Defendants
Walter B. Martin, Jr., Esq. (#4214)
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SEEN AND AGREED:

/s/ James L. Chapman IV
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David H. Sump, Esq.
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/s/ John R. Crumpler, Jr.
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Norfolk, Virginia 23514

Filed: October 3, 1995

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 93-2063
CA-93-868-N

MARITRANS OPERATING PARTNERS LIMITED PARTNERSHIP

Plaintiff-Appellee

v.

THE M/V BALSA 37, her engines, tackle, furnishings, etc., in rem; TSACABA SHIPPING COMPANY, INCORPORATED, in personam; DOWA LINE COMPANY, LIMITED, in personam

Defendants-Appellants.

No. 93-2068
CA-93-869-N

BOUCHARD TRANSPORTATION COMPANY, INCORPORATED; TUG CAPT. FRED S. BOUCHARD CORPORATION; BARGE B. NO. 155 CORPORATION

Plaintiffs-Appellees

v.

THE M/V BALSA 37, her engines, tackle, furnishings, etc., in rem; TSACABA SHIPPING COMPANY, INCORPORATED, in personam; DOWA LINE COMPANY, LIMITED, in personam

Defendants-Appellants.

No. 93-2201
CA-93-869-N
CA-93-868-N

MARITRANS OPERATING PARTNERS LIMITED PARTNERSHIP; BOUCHARD TRANSPORTATION COMPANY, INCORPORATED; TUG CAPT. FRED S. BOUCHARD CORPORATION; BARGE B. NO. 155 CORPORATION

Plaintiffs-Appellees

v.

THE M/V BALSA 37, her engines, tackle, furnishings, etc., in rem; TSACABA SHIPPING COMPANY, INCORPORATED, in personam; DOWA LINE COMPANY, LIMITED, in personam

Defendants-Appellants

On Petition for Rehearing with Suggestion for Rehearing in Banc

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The appellees' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK

RULES OF CIVIL PROCEDURE FOR UNITED STATES DISTRICT COURTS

RULE 4. SUMMONS...

(h) Service Upon Corporations and Associations. Unless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership or other unincorporated association that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed, shall be effected:

(1) in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by the law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant, or

(2) in a place not within any judicial district of the United States in any manner prescribed for individuals by subdivision (f) except personal delivery as provided in paragraph (2)(C)(i) thereof.

(Amended by order adopted April 22, 1993, effective December 1, 1993.)

SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

RULE B. Attachment and Garnishment: Special Provisions. (1) *When Available; Complaint, Affidavit, Judicial Authorization, and Process.* With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees to be named in the process to the amount sued for, if the defendant shall not be found within the district. Such a compliant shall be accompanied by an affidavit signed by the plaintiff or the plaintiff's attorney that, to the affiant's knowledge, or to the best of the affiant's information and belief, the defendant cannot be found within the district. The verified complaint and affidavit shall be reviewed by the court and, if the conditions set forth in this rule appear to exist, an order so stating and authorizing process of attachment and garnishment shall issue. Supplemental process enforcing the court's order may be issued b the clerk upon application without further order of the court. If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and process of attachment and garnishment and the plaintiff shall have the burden on a post-attachment hearing under Rule E(4)(f) to show that exigent circumstances existed. In addition, or in the alternative, the plaintiff may, pursuant to Rule 4(e), invoke the remedies provided by state law for attachment and garnishment or similar seizure of the defendant's property. Except for Rule E(8) these Supplemental Rules do not apply to state remedies so invoked.

(Amended by order adopted April 29, 1985, effective August 1, 1985, and by order adopted March

2, 1987, effective August 1, 1987.)

(2) *Notice to Defendant.* No judgment by default shall be entered except upon proof, which may be by affidavit, (a) that the plaintiff or the garnishee has given notice of the action to the defendant by mailing to the defendant a copy of the complaint, summons, and process of attachment or garnishment, using any form of mail requiring a return receipt or (b) that the complaint, summons, and process of attachment or garnishment have been served on the defendant in a manner authorized by Rule 4(d) or (i), or (c) that the plaintiff or the garnishee has made diligent efforts to give notice of the action to the defendant and has been unable to do so.

(Amended by order adopted March 2, 1987, effective August 1, 1987.)

(3) *Answer.*

(a) *By Garnishee.* - The garnishee shall serve an answer, together with answers to any interrogatories served with the complaint, within 20 days after service of process upon the garnishee. Interrogatories to the garnishee may be served with the complaint without leave of court. If the garnishee refuses or neglects to answer on oath as to the debts, credits, or effects of the defendant in the garnishee's hands, or any interrogatories concerning such debts, credits, and effects that may be propounded by the plaintiff, the court may award compulsory process against the garnishee. If the garnishee admits any debts, credits, or effects, they shall be held in the garnishee's hands or paid into the registry of the court, and shall be held in the case subject to the further order of the court.

(b) *By Defendant.* - The defendant shall serve an answer within 30 days after process has been executed, whether by attachment of property or service on the garnishee.

(Amended by order adopted March 2, 1987, effective August 1, 1987.)

RULES OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

LOCAL ADMIRALTY RULE (b)
MARITIME ATTACHMENT AND GARNISHMENT

LAR (b)(1) *"Not Found Within the District" Defined.* A defendant is considered to be "not found within the district" if, in an action *in personam*, the defendant cannot be served with the summons and complaint as provided in Federal Rule 4(d).

LAR (b)(2) *Affidavit that Defendant Is Not Found Within the District.* The affidavit required by Supplemental Rule (B)(2) to accompany the complaint shall list every effort made by and on behalf of plaintiff to find and serve the defendant within the district.

LAR (b)(3) *Ownership of Property.* In an action where the debts, credits, or effects named in the process of maritime attachment or garnishment are not delivered up to the process server by the defendant or the garnishee, or are asserted by the possessor not to be the property of the defendant, the process shall be served sufficiently by leaving a copy of the process with the defendant, garnishee or possessor, at his or her residence or usual place of business. When the return of service shows that process was so served, and when the plaintiff shows to the satisfaction of the court that the property does belong to the defendant or the garnishee, the court may proceed to hear and decide the case.

LAR (b)(4) *Use of State Procedures.* When the plaintiff invokes a state procedure in order to attach or garnish property under Federal Rule 4(e), the process of attachment or garnishment shall so state.

(Amended by order effective March 1, 1991.)

VA. CODE ANN. SECTION 13.1-758
(Michie 1995)

§ 13.1-758. **Consequences of transacting business without authority.**

. . .

F. Suits, actions and proceedings may be begun against a foreign corporation that transacts business in this Commonwealth without a certificate of authority by serving process on any director, officer or agent of the corporation doing such business, or, if none can be found, on the clerk of the Commission. If any foreign corporation transacts business in this Commonwealth without a certificate of authority, it shall by transacting such business be deemed to have thereby appointed the clerk of the Commission its attorney for service of process. Service shall be made on the clerk in accordance with § 12.1-19.1. (Code 1950, §§ 13-218, 13.1-119; 1956, c. 428; 1981, c. 320; 1985, c. 522; 1986, c. 571; 1990, c. 325; 1991, c. 672.)

VA. CODE ANN. SECTION 13.1-757
(Michie 1995)

§ 13.1-757. Authority to transact business required. -- A. A foreign corporation may not transact business in this Commonwealth until it obtains a certificate of authority from the [State Corporation] Commission.

B. The following activities, among others, do not constitute transacting business within the meaning of subsection A of this section:

1. Maintaining, defending or settling any proceeding;
2. Holding meetings of the board of directors or shareholders or carrying on other activities concerning internal corporate affairs;
3. Maintaining bank accounts;
4. Maintaining offices or agencies for the transfer, exchange, and registration of the corporation's own securities or maintaining trustees or depositories with respect to those securities;
5. Selling through independent contractors;
6. Soliciting or obtaining orders, whether by mail or through employees or agents otherwise, if the orders require acceptance outside this Commonwealth before they become contracts;
7. Creating or acquiring indebtedness, deeds of trust, and security interests in real property or personal property;
8. Securing or collecting debts or enforcing deeds of trust and security interests in property securing the debts;
9. Owning, without more, real or personal property;
10. Conducting an isolated transaction that is completed within thirty days and that is not one in the course of repeated transactions of a like nature;

11. For a period of less than ninety consecutive days, producing, directing, filming, crewing or acting in motion picture feature films, television series or commercials, or promotional films which are sent outside the Commonwealth for processing, editing, marketing and distribution. The term "transacting business" as used in this subsection shall have no effect on personal jurisdiction under § 8.01-328.1; or

12. Serving, without more, as a general partner of, or as a partner in a partnership which is a general partner of, a domestic or foreign limited partnership which does not otherwise transact business in this Commonwealth.

C. The list of activities in subsection B of this section is not exhaustive.

(Code 1950, §§ 13.1-102 to 13.1-102.2; 1956, c. 428; 1962, c. 239; 1980, c. 630; 1985, c. 522; 1990, c. 428.)

RULES OF CIVIL PROCEDURE FOR UNITED STATES DISTRICT COURTS

Rule 83. Rules by District Courts. Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public. In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.

(Amended by order adopted April 29, 1985, effective August 1, 1985.)

RULES OF CIVIL PROCEDURE FOR UNITED STATES DISTRICT COURTS

(1993 VERSION)

Rule 4. Process.

* * *

(d) Summons and Complaint: Person to be Served. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

> **(1)** Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.
>
> **(2)** Upon an infant or an incompetent person, by serving the summons and complaint in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction

of that state.

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or bylaw to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency.

(5) Upon an officer or agency of the United States, by serving the United States and by sending a copy of the summons and of the complaint by registered or certified mail to

such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by delivering a copy of the summons and of the complaint to the chief executive officer thereof or by serving the summons and complaint in the manner prescribed by the law of the state for the service of summons or other like process upon any such defendant.

(As amended Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Apr. 29, 1980, eff. Aug. 1, 1980; Jan 12, 1983, Pub.L. 97-462, § 2, 96 Stat. 2527; Mar. 2, 1987, eff. Aug. 1, 1987.)

Supreme Court, U.S.
FILED
DEC 8 1995
CLERK

No. 95-751

In The

Supreme Court of the United States

October Term, 1995

MARITRANS OPERATING PARTNERS, L.P., *et al.*,

Petitioners,

v.

THE M/V BALSA 37, *et al.*,

Respondents.

Brief In Opposition Of Petitioners' Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Court of Appeals for the Fourth Circuit properly conclude that LAR (b)(1) was consistent with Supplemental Admiralty Rule B and that the District Court had erred in failing to follow the plain reading of the Local Admiralty Rule?

LIST OF PARTIES

Tsacaba Shipping Co., Inc., is not a publicly held corporation. Dowa Line America, Inc., is a Delaware corporation and is a wholly owned subsidiary of Dowa Line Co., Ltd., Japan which is not a publicly held corporation.

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STATEMENT OF CASE

On August 11, 1993, the petitioner, Maritrans Operating Partners, L.P. ("Maritrans") filed a Complaint against the respondents in the United States District Court for the Middle District of Florida asserting that the M/V BALSA 37 was at fault in a maritime collision which occurred in the mouth of Tampa Bay. The petitioner alleged that the appellant was liable for the physical damages caused by the collision, as well as anticipated liability to third parties arising from the resulting oil spill. On August 17, 1993, petitioners, Bouchard Transportation Co., Inc., Tug Capt. Fred S. Bouchard Corp., and Barge B. No. 155 Corp. ("Bouchard") filed a similar complaint against the respondents in the United States District Court for the Middle District of Florida based upon the same incident.

On August 19, 1993, Maritrans and Bouchard sought from the United States District Court for the Eastern District of Virginia, Norfolk Division, orders under Rule B(1) of the Supplemental Rules for Certain Admiralty and Maritime Claims ("Rule B") directing the Clerk to issue process of attachment on the M/V BALSA 39, a sister ship of the M/V BALSA 37, which was also owned and/or operated by the respondents. Petitioners furnished the court with Verified Complaints and sworn affidavits stating that the respondents could not be found within the District and that diligent efforts had been made to locate the respondents within the District without success. The District Court issued the requested order. The M/V BALSA 39 was arrested by the United States Marshal after passing through the Virginia Capes and while inbound for Baltimore. The Marshal was accompanied on-board the vessel by a Hampton Roads pilot. The MV

BALSA 39 was diverted from her voyage to Baltimore and taken by the Marshal to a berth at Newport News, Virginia.

On August 20, 1993, the respondents moved the court below to quash the writ of attachment on the grounds that the respondents could be found within the District within the meaning of Rule B. The court denied the motion. On August 23, 1993, the respondents asked the court to reconsider respondents' Motion to Quash and/or set a bond for the release of the M/V BALSA 39. In its renewed motion, the appellants pointed out to the court that it had found respondents were doing business in Virginia and, if that were the case, then under the provisions of Local Admiralty Rule (b)(1), respondents were subject to service of process by serving the statutory agent, the Secretary of the Commonwealth or the Clerk of the State Corporation Commission. The court rejected respondents' argument on the grounds that to so hold would frustrate the intent of the purpose of Rule B.

By Order dated August 31, 1993, the court below found that its decision not to vacate the attachment of the M/V BALSA 39 involved a controlling question of law as to which there was substantial grounds for difference of opinion and that an immediate appeal from the Order could materially advance the termination of litigation. The District Court certified the following question to the Court of Appeals:

> If the defendants are correctly found by the court to be doing business in this District at the time of a Rule B attachment, should Local Admiralty Rule (b)(1) be read in conjunction with Supplemental Admiralty Rule B so as to render

> the availability of service upon the Clerk of the Virginia State Corporation Commission as meaning that the defendants may be found within the District as that term is used under Rule B. If the answer is in the affirmative, the attachment must be quashed.

The matter was fully argued before the United States Court of Appeals for the Fourth Circuit on April 13, 1994. On September 5, 1995, that Court rendered its opinion holding that where a federal rule and the local rule are not inconsistent the clear language of the local rule must be followed. The ruling of the District Court was reversed and the attachment of the M/V BALSA 39 quashed and vacated.

REASONS FOR DENYING THE WRIT

Petitioners' Petition for a writ of certiorari should not be granted as there are no special or important reasons which call for exercise of this Court's power of supervision. The opinion of the Court of Appeals for the Fourth Circuit is consistent with the only other appellate court case on this subject.

I. The Opinion of the Court of Appeals is consistent with the only prior decision of a court of appeals on this subject.

The decision of the Fourth Circuit in this matter is fully consistent with the decision of the Eleventh Circuit in *LaBanca v. Ostermuncher,* 664 F.2d 65 (11th Cir. 1981). In the *LaBanca* case the Court held that a defendant was not

"found within the district" where there was a statutory agent who could be served but that statutory agent was not subject to process in the district in which attachment was sought. Thus the Eleventh Circuit indicates that if that statutory agent had been within the district where attachment was sought, then the defendant would be "found within the district". This would be the same result reached by the court below.

II. Local Rules have the force and effect of law and are binding upon the parties and the court which promulgated them.

The Eastern District of Virginia has by LAR(b)(1) defined the clause "not found within the district" for cases in its jurisdiction as follows:

> LAR(b)(1) "not found within the district" defined. A defendant is considered to be "not found within the district" if, in an action in personam, the defendant cannot be served with a summons and complaint as provided in Federal Rule 4(d).

This rule is clear and unequivocal. It states simply that if a summons or complaint can be served on a statutory agent for the defendant as provided in Federal Rule 4(b) then that defendant is found within the district.

Rule 4(b)(3) provides that service can be effected on a foreign corporation by serving a statutory agent authorized by law to accept service of process.

Virginia Code annotated Section 13.1-758 appoints the Clerk of the State Corporation as a statutory agent to

accept service of process of corporations transacting business in Virginia and which corporations are without a Certificate of Authority to do business in Virginia and when no director, officer, or agent of the corporation is found in Virginia.

There is only one interpretation that can be given to LAR(b), i.e., if the defendant can be served by service on a statutory agent then that defendant is within the district for the purposes of service of process. The attachment in question was sought under Supplemental Admiralty Rule B(1) which permits in a maritime claim attachment of a defendant's goods found within the district if the defendant shall not be found within the district if the defendant shall not be found within the district.

These rules are not inconsistent, they are complementary. The language of both rules is clear and unequivocal.

As was concisely stated by the Appellate Court below, "where the Federal Rule and Local Rule are not inconsistent, which these are not, the clear language of the Local Rule dictates our decision, . . . "

CONCLUSION

Based upon the foregoing authorities, argument, and the clear and unequivocal wording of the Federal Rule and Local Admiralty Rule here involved, respondent respectively submits that the petition for writ of certiorari must be denied. The language of the Local Admiralty Rule and the Federal Rule here involved are clear and unequivocal. The opinion of the Court of Appeals for the

Fourth Circuit is consistent with a previous opinion for the Court of Appeals for the Eleventh Circuit, the only other appellate court which has spoken on this subject. There are no other special or important reasons which call for an exercise of this Court's power of supervision.

Respectfully submitted,

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December 8, 1995
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